What is Wrong about the 'Criminal Mind'?[1]

Thom Brooks

Abstract. Retributivists argue for a strong link between a criminal's mind-set at the time of an offence and our community's response through punishment. This view claims that punishment can be justified depending on the possession of a criminal mind which can be affected by factors that may affect culpability, such as mitigating factors. Retributivism is a powerful influence on our sentencing practices reflected in policy. This article argues it is based on a mistake about what makes the criminal mind relevant for punishment. It will be argued that a currently popular view of retribution endorsed by Feinberg and Duff – 'retributivist expressivism' – incorrectly link punishment to a criminal's possession of moral responsibility. This is a problem because its absence is no defence to strict liability offences, the largest subset of crimes. It is not a crime's threat or harm to morals that is most salient, but instead its threat or harm to our rights.

1. Introduction

Should we punish offenders because they have a 'criminal mind'? Retributivists argue for a strong link between a criminal's mind-set at the time of an offence and our community's response through punishment. This view claims that punishment can be justified depending on the possession of a criminal mind which can be affected by factors that may affect culpability, such as mitigating factors. Retributivism is a powerful influence on our sentencing practices reflected in policy, such as the sentencing purposes listed in the Criminal Justice Act 2003.[2] These include purposes like 'the punishment' of offenders that are linked the sentencing purposes originally found in the Model Penal Code, such as the purpose of differentiating offenders through 'a just individualization in their treatment'.[3]

It is argued that this view is based on a mistake about what makes the criminal mind relevant for punishment. It will be argued that a currently popular view of retribution endorsed by Feinberg and Duff – 'retributivist expressivism' – incorrectly link punishment to a criminal's possession of moral responsibility. This is a problem because its absence is no defence to strict liability offences, the largest subset of crimes. It is not a crime's threat or harm to morals that is most salient, but instead its threat or harm to our rights. We can make sense – and make better sense – of desert and sentencing practices through a rights-based approach. This is because the wrongs we are primarily concerned with in fact are not found in the criminal mind-set, but rather the potential and actual infringement of rights.

This article focuses on the distinctively retributivist claim that morality forms the connection between crimes and harms: crimes are not any kind of harm, but specifically a kind of *immorality* demanding punishment. The criminal mind is, thus, an immoral mental state that deserves punishment as its justified response. One especially influential variety of

[1] An earlier version of this essay was presented to the Oxford Jurisprudence Group. My thanks to the audience and, most especially, to John Gardner, Les Green and Fred Schaeur for their comments. This piece develops my critique of retributivist expressivism in new directions, expanding and clarifying my views in Thom Brooks, 'Criminal Harms' in (ed.), *Law and Legal Theory* (Brill 2013).

[2] See Criminal Justice Act 2003, s142.

[3] American Law Institute, *Model Penal Code* (ALI 1962), sect. 1.02.

retribution we might call 'retributivist expressivist' and developed by Joel Feinberg, Antony Duff and others. Retributivist expressivists argue that punishment has an *expressivist* function of communicating societal disapproval to criminal offenders for their moral wrongdoings where punishment is proportionate to the immorality of their crimes. The following sections argue that it is not compelling both as a view about the criminal law, but also as a theory about punishment. The article concludes with a brief examination about how criminal harms might be better understood. It is argued that crimes might be a kind of harm, but not the kinds of harm endorsed by retributivists and, more specifically, expressivists. Sentencing should not aim at punishing the criminal mind, but the threat to our rights. Mind-sets can matter, but not how retributivists think. The primary claim is that retributivist expressivism should be rejected and plausible alternatives may be available.

2. Retributivist Expressivism

The Victorian Judge James Fitzjames Stephen presents an early exposition of *retributivist expressivism*:

> The sentence of the law is to the moral sentiments of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment . . . *the infliction of punishment by law gives definite expression and solemn justification to the hatred which is excited by the commission of the offence*.[4]

Retributivist expressivism claims that punishment is the expression of public hatred for a criminal offence that is communicated to an offender. The public's voicing of its 'moral sentiments' confirm its anger: criminalization and punishment is justified, in part, by their moral aversion to a crime. Crimes are not merely harms, but harmful to morals and so deserve punishment where an essential role is played by the expression of public anger to offenders through their punishment.

This approach brings together two different, but interrelated ideas. The first is retributivist desert, a contested concept.[5] The *standard view* of retributivist desert is presented above: punishment is justified where offenders deserve it because of their moral responsibility for some evil act or omission. Therefore, punishment should be set proportionate to their moral responsibility and the resulting evil. What justifies criminalization of some act or omission is its immorality; likewise, what justifies punishment of some act or omission is its degree of immorality, too. Murderers and thieves should be punished because each performs evil actions, but the former should be punished more severely because the evil of murder is greater than the evil of theft. So the murder possesses *more* retributivist desert because of this combination and this can be an object of communication between the public and offenders.

The second idea is communicated expression between the public and the offender. Punishment should be communicated to offenders as an *expression* of public disapprobation for criminal wrongdoings. This idea has gained contemporary prominence through the work of Joel Feinberg, who argues that punishment has a 'symbolic significance' that the idea of

[4] James Fitzjames Stephen, *A History of the Criminal Law of England* (London 1883), 81—82 (emphasis added).
[5] Thom Brooks, *Punishment* (Routledge 2012), 15—34.

punishment as an expression of public anger captures well.[6] Punishment expresses the community's moral condemnation of crime where crime is a harm *to morals*. These two ideas can be taken together: punishment is justified as the communication of retributivist expressivism. Punishment is an activity communicated by the state to offenders pertaining to their retributivist desert for moral wrongdoing that is best communicated through the expression of legal punishment.

Some caveats are necessary. First, this justification of punishment understands 'punishment' in a specific way. Feinberg famously distinguishes 'punishment' from 'penalties'.[7] Punishment refers only to the use of prison: to speak of the justification of punishment is to address possible defences of hard treatment. Penalties encompass everything else, such as community sentences, monetary fines and verbal warnings. All retributivist expressivists are committed to the view that there is a difference in kind between *punishment as imprisonment* and *punishment as a response to crime*. The first understands punishment as only the use of prisons; the second views punishment as a set of responses to crime inclusive of penalties and hard treatment. Retributivist expressivists claim only the former (and not the latter) count as 'punishment'.

This perspective is problematic for two reasons. First, it is incorrect to say that *only* imprisonment can 'express' public condemnation to offenders. The discovery of a fine for illegal parking may be a penalty in Feinberg's terminology, but it is hard to see how receiving a fine cannot be understood by the person fined as some token of condemnation. The parking ticket is a symbol of public disapproval by imposing a financial burden that clearly does not communicate acceptance or public reward. So perhaps a fine cannot express condemnation as loudly as a sentence, it may be more convincing to view penalties and imprisonment as falling along some scale of punishment.

Secondly, Feinberg's distinction falsely presents us with an either-or distinction. A penal outcome is *either* a penalty or punishment and not both. The problem is that this departs from the reality in many jurisdictions where convicted offenders who are imprisoned often receive some form of penalty as well. The point is that penalties and hard treatment are not either-or options for magistrates or judges, but part of a catalogue of potential penal outcomes that are available and regularly distributed together rather than one or the other.

A second caveat is that there is a curious relationship between the theories of retribution, expressivism and communicative theories of punishment exposing overlaps and contrasts. This claim is more than merely terminological. Each is understood in somewhat different ways although each also presents itself as a distinct alternative to rival theories of punishment despite possessing a shared view of desert. Retributivists do not always accept the view that punishment must require some further justification beyond its being deserved, such as an expression of public disapproval. Expressivists and communicative theorists accept this perspective, but it remains unclear how their views are distinct from retributivists. Expressivists claim punishment is an expression of public disapproval, but only for some disapprovals and not others—and then only in proportion to a specified range of behaviour

[6] Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press 1970), 98.
[7] Ibid.

where public disapproval is relevant.[8] In fact, expressivism accepts that only the deserving should be punished and to the degree deserved. Therefore, it is difficult to see what work 'expressivism' does for expressivist theories as such because offenders receive what is deserved and no less. To say that what is deserved is presented to offenders as an expression of public condemnation does not offer us anything new by emphasising any expressivist character. Retributivists and so-called 'expressivists' defend the same penal outcomes grounded in similar views about desert.[9]

The communicative theory of punishment, foremost championed by Antony Duff amongst others, claims that punishment must be 'communicated'.[10] Duff argues punishment should not only 'express' public disapproval from the public to offenders, but we should consider an offender's time served in prison as a 'communication' of penance expressed from offers to the public. Nevertheless, communicative theories also limit the justification of punishment to the deserving and in proportion to what is deserved. While crucial to highlight the stated differences between retribution, expressivism and communicative theories, it is important to note their potential overlap. Indeed, there may be some redundancy in the idea of 'retributivist expressivism'.

This idea has gained in popularity for several reasons. The first is that criminal law has been perhaps the most natural law-friendly area of law for many theorists. Most traditional crimes are widely consistent with what any reasonable moral theory would disapprove, if not denounce. Crimes such as murder, theft or rape are perhaps the first to come to mind for most people. A natural overlap between the most serious moral wrongs and crimes might suggest some deeper connection between the criminal law and morality and so provide a more welcoming environment for natural law jurisprudence. Plus, this link between the morality and lawfulness is brought together in the idea of a criminal mind: the mental state of an offender is the key to unlocking our knowledge of his desert for a criminal wrong.

A second reason is the concern for providing a more robust justification for punishment within the context of a modern, liberal democracy. Retribution is about the enforcement of some moral perspective on all: we punish crimes as moral wrongs as determined by some viewpoint. But which one? The reassessment of retribution as retributivist expressivism opens up the possibility of a more compelling answer: wrongs are determined by 'us' and expressed through 'our' shared communication of public disapproval. In this way, retributivist expressivism can speak to some common agreement about morals found in our shared expression of public denunciation towards criminal wrongs that might avoid problems associated with the fact of reasonable pluralism and diverse moral views.[11]

The following two sections consider the idea of retributivist expressivism from a more critical perspective. First, it is argued that this idea provides a problematic and unpersuasive view about the criminal law. Secondly, it is argued that retributivist expressivism does not offer a compelling theory about punishment more generally and so we require a new model.

3. Retributivist Expressivism and the Criminal Law

[8] Brooks, *Punishment*, 115—17.
[9] Willie Charlton makes a compelling case that expressivists dress up retribution with 'undue glamour' in this way. See W. E. W. St. G. Charlton, 'Rules and Punishments', [1966] *Think* 3.
[10] See R. A. Duff, *Punishment, Communication and, Community* (OUP 2001).
[11] See John Rawls, *Political Liberalism*, paper edn (Columbia UP 1996), 153.

Does retributivist expressivism offer a view consistent with the criminal law? It may appear to be consistent at first glance although this is a mistake. For example, most crimes we might think about may include murder, theft, rape or criminal damage. Any reasonable view of morality will at least disapprove, if not strongly denounce, them all. Different moral theories may disagree on the precise reasons while reaching the same conclusions. The deontologist might denounce murder as a failure to treat persons with the dignity they possess and respect owed. Utilitarians might denounce murder as a means to maximise happiness and minimise pain. Reasonable religious believers might claim murder is wrong because of widely shared beliefs about the value of life. Or not. These are only three general illustrations to show how different persons may agree murder is morally wrong and for different reasons. Many other examples could be given.

There is clearly something to be said for the claim that many criminal offences correspond toward much of what most of us would find morally problematic, especially in regard to more serious criminal offences. The question is then not whether there is an overlap between crimes and immorality,[12] but rather a much deeper query about the causal link: are crimes harms to morals, such as the examples considered thus far?

This view has defenders among retributivist expressivists. For instance, Antony Duff argues that 'the criminal law aims to "enforce morality" in the sense that . . . it is inconsistent with the central moral values of the political community'.[13] Duff claims that the criminal law enforces public morality through punishment: 'The law "prohibits" murder, rape, and the like because such conduct is wrongful in a ways that properly concerns the law—wrongful in terms of the shared values of the political community'.[14] We criminalise acts or omissions because they fail a moral standard that is found in the shared values we have and that find expression in our public disapproval.

But such a perspective has powerful critics. H. L. A. Hart was surely correct to say that 'Has the development of the law been influenced by morals? The answer to this question plainly is "Yes"'.[15] But is illegality linked with immorality? The answer to this more fundamental question is plainly 'no'. Much of the criminal law governs actions and omissions that need not be considered immoral by any reasonable moral view. When we consider crimes in general, our first thoughts may likely to focus on so-called 'other-regarding' harms. These are crimes involving the infliction of some harm to someone, such as murder, theft and rape. Not all crimes have this character. Some are self-regarding, such as drug offences. Other crimes might lack victims or persons wronged (self or other), such as traffic offences.

Consider illegal parking. This is a traffic offence and part of the criminal law. It might not be the first type of offence to immediately spring to mind, but it is an offence that more of us have direct knowledge about: we can normally expect far more instances of illegal parking than murders for most, if not all, political communities. What does it mean to say this offence is *immoral* or even a *moral wrong*? Perhaps illegal parking through double parking prevents someone who has lawfully parked her vehicle from free movement. Or illegal parking on a

[12] See Thom Brooks, 'Legal Positivism and Faith in Law', [2014] 77 MLR 139.
[13] Duff, *Punishment, Communication, and Community*, 67.
[14] Ibid., 58.
[15] H. L. A. Hart, *Law, Liberty, and Morality* (OUP 1963), 1.

narrow street might prevent normal access for traffic to travel. Both might be instances where the offender demonstrates a clear disregard for the respect for others to some degree.

But this need not be true in every case. Illegal parking is not defined by our distinguishing the sinful from the virtuous, but often in utilitarian terms. We ask: how can traffic move most freely through specific spaces? The fact that a one way street restricts movement to a single direction need not be because this is morally good or desirable, but rather because the road might be narrow and restricting traffic to a single direction maximizes our ability to travel around the vicinity most easily all things considered. So the law might enforce criminal law without any obvious connection with morality. Note that many country roads, such as in my adopted Britain, may be as narrow as any city street, but only the latter might not permit parking on either side and be restricted to one way travel. That we park here or there and drive one direction or another might often be settled almost by chance and luck than morality and virtue. Note further that illegal parking might be morally justified or even morally required depending upon context, such as enabling a life-saving rescue. Illegal parking is not best explained with reference to its *immorality*, but rather its *practicality* as our rights may have more relevance than any moral wrongs. We will return to this point in the next section.

Consider a very different crime like treason.[16] Every state punishes it with the most severe amount available to that state. Is treason immoral or morally wrong? The answer is clearly no. Again, there may be cases where treason is morally justified or morally required, such as acts of treason against Nazi Germany or some similar evil state. The criminality of treason is not essentially about moral wrongdoing, but more about practical concerns.

The examples of illegal parking and treason are chosen to identify a spectrum of crimes that any state would include in its criminal law punished relatively small in the case of illegal parking and commanding the most severe sanction in cases of treason. They are also crimes whose 'wrongness' is relatively independent to immorality. If retributivist expressivism cannot account for crimes like these, then it might have a significant problem as a theory of punishment. This is because theories of punishment are theories about practices. Perhaps it is to be expected that there will be some gap between our ideal view of punishment and practices found in any particular state.

The fact there is a gap is not the problem; the problem is the size of this gap. Retributivist expressivism runs into trouble not only with crimes on both ends of the scale, but many in between. This is perhaps especially true with so-called crimes involving self-regarding harms. These may include drug offences and (more controversially) prostitution. Few proponents of drug criminalization argue for full legalization of all currently banned drugs. Likewise, few proponents of legalizing prostitution call for full deregulation. So how does the community express its disapproval for acts a person has performed that might cause no harm or inconvenience to the community? How much public anger will stir our collective moral sentiments? The answer is unclear at best.

A serious problem for retributivist expressivism is it is a theory of punishment that rests on a particular foundation consistent with natural law – and at odds with the existing criminal law. It is a theory of punishment that can address only some, but not all, crimes we

[16] See Treason Act 1351.

would want to include in the criminal law. None of this is to suggest that crimes are not harmful in any way. But the view of crimes as harms to morality stretches too far beyond the criminal law as we find it and even perhaps as we would want it to be. This point is important because it highlights the problem at the heart of retributivist expressivism: its claim that we should punish the possession of a criminal mind to the degree an offender has desert as an expression of public anger rests on a view that what is punishable is a wrongful criminal mind. But this defends an implausible position that crimes are best understood as kinds of harms to morals because this does not hold, or at least not among all crimes we would want a view about punishment to account for.

Against Retributivist Expressivism

Retributivist expressivism offers a poor match with the criminal law. But is it a compelling theory about punishment? The idea of expressive communication entails the public speaking with one voice. Offenders receive a message expressed by the public about how much they disapprove of their crimes. However, it is a mistake to argue the public speaks with a single, unified voice in the way suggested. This point is defended well by Hart:

> It is sociologically very naive to think that there is even in England a single homogeneous social morality whose mouthpiece the judge can be in fixing sentence . . . Our society, whether we like it or not, is morally a plural society; and the judgements of the relative seriousness of different crimes vary within it far more than this simple theory recognizes.[17]

Modern society is characterized by the fact of reasonable pluralism.[18] No political community possesses one 'social morality' and not others, even if it may privilege one or some. Every community is pluralist and contains reasonable disagreement about moral and political values. One consequence is that there is no single voice from which the community might speak. This is because the political community contains more than one moral view. Perhaps there may be agreement—even an 'overlapping consensus'—that an offender should be punished to some degree, but the reasons for this decision may likely be several and perhaps conflicting.

A more nuanced problem with retributivist expressivism is the claim that the public can express its disapproval speaking as one voice is that this expression will communicate a particular message. Indeed, we may be unable to guard against communicating *unintended* meanings.[19] It is a mistake to claim that punishment expresses a single message to any messenger, but it may instead multiple messages arising from the reasonable pluralism that exists in any modern political community. Moreover, we should not insist that punishment expresses only the message (or messages) we intend to express because there may unintended messages communicated as well.

One possible response is offered by Duff. He argues that 'we should not hope to find any criterion, or neat set of criteria, of criminalization' that addresses this concern about what

[17] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon 1968), 171.
[18] Rawls, *Political Liberalism*, 153.
[19] See Charles W. Collier, 'Speech and Communication in Law and Philosophy', [2006] 12 *Legal Theory* 1, 8—9.

kinds of wrong are to serve as public wrongs deserving of punishment.[20] So perhaps there are many different messages communicated. Criminalization rests on difficult to unpick foundations and his communicative version of retributivist expressivism still remains the most compelling theory.

This is unsatisfactory. Supposing there might not be a single standard of 'immorality' derivable from the community's shared values, there remains (*a*) no argument or evidence of what values are shared by our community, (*b*) no satisfactory recognition that the values held by community members may be in conflict nor how such conflicts might be resolved and (*c*) no clear view about the problem of securing the communication of intended meanings while guarding against the expression of unintended meanings.

Retributivist expressivism has a much deeper problem: it is either redundant or incoherent. Retributivist expressivism claims punishment is to be proportionate to the amount of public denunciation appropriate. For example, Feinberg says: 'What justice demands is that the condemnatory aspect of the punishment suit the crime, that the crime be of a kind that is truly worthy of reprobation'.[21] Punishment is an expression of public disapproval.

However, not all public disapproval should be expressed as punishment. Only that which is 'truly worthy'—or, in other words, that which is *deserved*—can be the subject of punishment. Punishment is then proportionate to an offender's desert. The problem here is that the degree of appropriate public condemnation need not always be equal to the moral wrongfulness of a criminal offence. After all, we can 'exact retribution . . . without denunciation' and 'denounce a crime without exacting retribution'.[22]

Retributivist expressivists do not argue that, if public condemnation exceeded moral wrongfulness, punishment should be set more severely than deserved. Nor do they argue that, if moral wrongfulness exceeded public condemnation, punishment should be set much lower to bring it closer in line to public disapproval. Note that public disapproval does little, if any, work: punishment is justified when it is retributively deserved and punishment should be in proportion to what is deserved. Expressivism collapses into retributivism.

Now consider Duff's variant on retributivism expressivism. He argues that his communicative view helps to develop retributivism although it is also distinct from it.[23] Retributivists look backward-only to the past crime whereas Duff's theory also looks forward to the future in order 'to persuade offenders that they should repent'.[24] Duff says:

> If he is convicted, his conviction communicates to him (and to others) the censure that he has been proved to deserve for his crime. He is expected (but not compelled) to understand and accept the censure as justified: to understand and accept that he committed a wrong for which the community now properly censures him. His trial

[20] R. A. Duff, 'Answering for Crime', [2006] CVI *Proceedings of the Aristotelian Society* 85, 89.
[21] Feinberg, *Doing and Deserving*, 118.
[22] John Cottingham, 'Varieties of Retribution', [1979] 29 *Philosophical Quarterly* 238, 238.
[23] Duff, *Punishment, Communication, and Community*, 25, 30.
[24] Ibid., 30.

> and conviction thus address him and seek a response from him as a member of the political community who is both bound and protected by its laws.[25]

For Duff, imprisonment serves 'the communicative aims of punishment *more adequately* than . . . mere convictions or symbolic punishments; a communicative conception of punishment thus provides for its *complete* justification'.[26] Imprisonment serves communicative aims by providing 'an opportunity' for criminals 'to examine their souls', but not 'invade' them.[27] We are told 'punishment must go deep with the wrongdoer and must therefore occupy his attention, his thoughts, his emotions, for some considerable time'.[28] For Duff, the ability to 'go deep' is available only through imprisonment: demonstrating repentance is not enough.

The first problem with his particular theory of punishment is empirical. Imprisonment is said to 'more adequately' satisfy the communicative aims of bringing about a change of heart in offenders than the use of other sanctions. This is an empirical claim for which the only available evidence suggests that, in fact, imprisonment does not perform this task better than alternatives.[29] It is highly surprising to find Duff offering such a claim in light of the weight of evidence against this position.

Nevertheless, Duff is often at some pains to argue that the empirical foundations of his theory of punishment rest on how prison should be rather than how it is. He says:

> Such an objection would have force if my claim were that the familiar kinds of hard treatment punishment which are salient in our existing penal systems actually serve to induce repentance and self-reform, but that is not my claim . . . My claim is rather that suitably designed and administered kinds of hard treatment should, and in principle could, serve those aims . . . it does not depend on proof that our existing penal systems serve those aims.[30]

The problem with this position is not simply that imprisonment as currently practised fails to satisfy the communicative aims he sets for punishment (and it clearly fails these aims). Instead, there seems no compelling reason to accept—given what we know—that imprisonment will 'always "more adequately"' serve communicative aims better than any alternative approach.

There is a further concern with Duff's theory. He says:

> But how can his punishment reconcile him to his victim or the wider community if it is obvious that he is unrepentant and unapologetic? . . . The offender has been subjected to what would constitute an appropriately reparative apology if he undertook it for himself. His fellow citizens should therefore now treat him as if he had apologized . . . He might not have paid the apologetic debt that he owed . . . But

---

[25] Ibid., 80. See also Thom Brooks, 'The Right to Trial by Jury', [2004] 21 *Journal of Applied Philosophy* 197 and Thom Brooks (ed.), *The Right to a Fair Trial* (Ashgate 2009).
[26] Duff, *Punishment, Communication, and Community*, 82 (emphasis added).
[27] Ibid., 87 and see 122—23, 133.
[28] Ibid., 108.
[29] Brooks, *Punishment*, 123—48.
[30] R. A. Duff, 'Om Defence of One Type of Retribution: A Reply to Bagaric and Amarasekara', [2000] 24 *Melbourne University Law Review* 411, 420.

> something like that debt has been exacted from him, and those who exacted it should now treat him *as if the debt has been paid*'.[31]

What is striking about this passage is that the importance of repentance (and apology) drops out of the picture and appears to do little, if any, work. One concern is that simply serving a length of time in prison is transformed into some 'apologetic debt'. The problem is not simply that there is no evidence that placing offenders in prison is always more likely to inculcate a greater respect for the law than alternatives, but that ultimately it is of no concern whether offenders *do* repent and receive whatever moral communication we had sent, if any. Becoming repentant disappears: 'doing time' is 'repentance' by definition.

For Duff, communicative theories are different from others: expressivism is only about the expression of the public to offenders, but communication includes an expression from the offender to us. But, in fact, no such communication from offender to us may be expressed or perhaps even possible. The 'communicative' theory of punishment may include no actual communication at all and yet its presence is at the heart of its claims about the justification of punishment.

Crimes as Harms to Rights

The idea of crimes as harms to morals does not cohere well with current criminal law nor how we might want it changed. Nor do the theories of punishment that endorse this idea offer us a compelling view about crime, morality or punishment. Crime is often considered to be a harm. This may have much to do with the attractiveness of the harm principle whereby an individual is free unless he or she might harm another. Many criminal offences are harms, such as murder or actual bodily harm. However, this perspective captures too much for not all harms are or should be criminal. One example is prize fighting who harm each other when boxing. Few (besides me) believe this should be criminalized. Perhaps all crimes are harms, but not all harms are crimes.

We have considered at some length one attempt to clarify more sharply the idea of crimes as harms in the formulation of crimes as harms *to morality*. We found that this is perhaps too narrow because it omits much of what we would want the criminal law to include. Many crimes are immoral (on various and competing views), but not all are so. Moreover, not all immorality is or should be criminalized: no one (including me) believes telling a white lie to keep a surprise birthday party a secret a wrong in every instance.

Another attempt is the idea of crimes as harms *to rights*. This is a position I defend at length elsewhere and summarise here.[32] This view understands the criminal law is one part of a wider effort to protect and maintain our rights. Crimes are harms to our rights considered as substantial freedoms warranting protection and preservation.[33] Punishment is *a response* to crime that, as a response, may take multiple forms. But the justification of punishment is as a response to crimes in order to enable the protection and preservation of our rights. And, thus, crimes are a kind of rights violation that may require intervention.

---

[31] Duff, *Punishment, Communication, and Community*, 123—24.
[32] Brooks, *Punishment*, 123—48.
[33] This understanding of rights is broadly consistent with a variety of different approaches to the philosophy of rights, including the capabilities approach. See Thom Brooks (ed.), *Justice and the Capabilities Approach* (Ashgate 2012) and Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP 2000).

All crimes are rights violations and some rights are more central than others. For example, some rights, such as a right against being murdered, is necessary to make possible other rights. Our more fundamental rights may warrant greater protection and, thus, more greater responses via criminal justice. This perspective is captured by the 19th Century British Idealist T. H. Green, who says: '[Punishment] is a disapproval founded on a sense of what is necessary for the protection of rights'.[34] The relation of rights and punishments is clarified by another 19th Century British Idealist named James Seth:

> This view of the object of punishment gives the true measure of its amount. This is found not in the amount of moral depravity which the crime reveals, but in the importance of the right violated, relatively to the system of rights of which it forms a part . . . The measure of the punishment is, in short, the measure of social necessity; and this necessity is a changing one.[35]

For Seth, we reflect on the central importance of the rights we have and protect through the criminal law. Some rights require greater protection than others as their violation may endanger our fundamental freedoms more than other crimes. We then punish murder more than theft because the former represents a greater threat to our rights than the latter.

Note that this new model can overcome problems associated with retributivist expressivism. Punishment might metaphorically 'express' public disapproval, but this has a definite shape – and it is not purely the stuff of moral philosophy. Instead, punishment is about the protection of rights. This can better capture a wider range of criminal offence categories, including strict liability where moral responsibility is lacking. Plus, this rights-based approach is more flexible: this is premised on an assumption that a pluralistic society may stand a better chance of finding agreement on their rights requiring protection than some shared morality to be expressed through retribution.

It is not claimed here that this alternative model is compelling, but rather that an alternative is possible to the dominant and problematic approach of retributivist expressivism. The point is clear: retributivist expressivists claim a strong link between the wrongness of the criminal mind and its punishment. This link should be rejected and another option is available grounded in a rights-based approach that has promise.

Conclusion

What is wrong about the criminal mind? Retributivist expressivists argue the criminal mind is a state of mind someone possesses at a particular time and which determines how much punishment is justified. Someone's retributivist desert – understood as a kind of moral responsibility for an immoral wrong – is all we require. This perspective has been rejected because it rests on an incorrect link between criminalization and immorality. Moral responsibility may not feature in many, if not most, offences and it is unclear that it must play a role in other cases either. Instead, a rights-based alternative is available as one of many possible options. This view suggests that what is wrong about the criminal mind is not its

---

[34] T. H. Green, *Lectures on the Principles of Political Obligation* (Longman 1941), §197.

[35] James Seth, *A Study of Ethical Principles* (William Blackwood & Sons 1898), 305. See H. J. W. Hetherington and J. H. Muirhead (eds), *Social Purpose: A Contribution to a Philosophy of Civic Society* (George Allen & Unwin 1918), 129.

moral responsibility *per se*, but its connection to harms to our rights. The conclusion drawn is we have compelling reasons to reject the influential approach of retributivist expressivism found in Feinberg, Duff and others and instead look elsewhere. This piece briefly sketched one such place that may prove fruitful. Better pastures can be found somewhere else.